(3)

No. 05-1335

IN THE

Supreme Court of the United States

DARRYL S. LADDIN,
as Trustee of the ETS Creditors' Litigation Trust,

Petitioner,

v.

RELIANCE TRUST COMPANY, PENSCO, INC.,
and COMMUNITY NATIONAL BANK,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

BRIEF IN OPPOSITION FOR RESPONDENTS RELIANCE TRUST COMPANY AND PENSCO, INC.

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QUESTIONS PRESENTED FOR REVIEW

Petitioner's questions mischaracterize the issues that were actually before the Eleventh Circuit. If anything, the only question presented by this record is whether a bankruptcy trustee can assert claims against a third party on behalf of a debtor when the allegations in his complaint demonstrate that the debtor itself actively participated in the alleged conduct on which the claims are based and, thus, the debtor could not have brought the claims outside of bankruptcy. However, all of the Circuits that have addressed the issues raised below, specifically, the Second, Fourth, Sixth, Eighth, Tenth, and Eleventh Circuits, have uniformly answered the question in the negative.

CORPORATE DISCLOSURE STATEMENT

Reliance Trust Company is a wholly-owned subsidiary of Reliance Financial Corporation. PENSCO, Inc., does not have a parent company and no publicly held company owns 10% or more of PENSCO, Inc.'s stock.

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INTRODUCTION

Simply stated, Petitioner is asking this Court to ignore the clear meaning of applicable statutory law to overturn the decisions of the Second, Fourth, Sixth, Eighth, Tenth, and Eleventh Circuits and adopt the position advocated by some legal commentators who wish that the law were different than it is. If anything, the only question presented by this record is whether a bankruptcy trustee can assert claims against a third party on behalf of a debtor when the allegations in his complaint demonstrate that the debtor itself actively participated in the alleged conduct on which the claims are based and, thus, could not have brought the claims outside of bankruptcy.

Consistent with the decisions of every Court of Appeals that has looked at the issues raised below, the Eleventh Circuit rejected Petitioner's attempt to assert claims on behalf of a debtor that the debtor itself could not have asserted. Petitioner has not and cannot demonstrate that the Eleventh Circuit's January 30, 2006, Opinion (the "Opinion") is in conflict with any decision of this Court or another Court of Appeals, or that the Eleventh Circuit decided an important federal question that has not been addressed by this Court. In fact, Petitioner acknowledges, as the Eleventh Circuit did in its Opinion, that *all* of the Courts of Appeals that have addressed the issues discussed therein have uniformly held that the *in pari delicto* defense bars a bankruptcy trustee from asserting the kinds of claims that Petitioner is trying to assert against the Respondents.

Even if this Court were inclined to engage in the judicial legislation that Petitioner is inviting, the result in this case should be the same because Petitioner's own pleadings set

forth such a clear case of *in pari delicto* on the part of the debtor whose claims Petitioner is purportedly trying to assert in this case. In other words, this is a case where the specific factual allegations pled by Petitioner and relied upon by the lower courts were determinative of the outcome. Finally, because the Private Securities Litigation Reform Act provides an additional and alternative basis for affirming the lower court's decision, review by this Court is unwarranted.

RESPONSE TO PETITIONER'S STATEMENT OF THE CASE

The Eleventh Circuit Court's Opinion, reproduced in the Appendix to the Petition for *Writ of Certiorari* (the "Petition"), contains most of the relevant facts, which are taken from Petitioner's Third Amended Complaint itself. For the most part, the Respondents agree that the Petitioner's "Statement of the Case" provides an accurate synopsis of the relevant facts and an accurate summary of the decisions of the courts below. Rather than repeat each element of Petitioner's Statement of the Case, the Respondents will instead address areas of disagreement and clarification below.

Petitioner is the trustee of the ETS Creditors' Litigation Trust, which was created by the Debtors and Creditors Committee in the course of the bankruptcy of ETS Payphones, Inc. ("ETS"). As trustee, Petitioner sued more than forty-one (41) defendants on various legal theories over the course of several years in several amended complaints. As to the Respondent IRA Custodians, the Third Amended Complaint alleged counts for Aiding and Abetting Breach of Fiduciary Duty to the Debtor (Count I), Aiding and Abetting Breach of Fiduciary Duty to Creditors (Count II), and RICO violations (Counts XI, XII, and XIII). More importantly, as

the Eleventh Circuit noted, the allegations of Petitioner's Third Amended Complaint (which are considered to be true for purposes of Respondents' Motion to Dismiss) establish that ETS was in active participation with the Respondents. Petitioner's Appendix at 26a. Petitioner alleged that "ETS [the debtor] devised the scheme and promoted and marketed the sale and leaseback of payphones as investment opportunities to individuals." *Id.* ETS also "control[led] all aspects of the operation," "created marketing and promotional materials," and "promised returns . . . of 14% or 15%," although it "assumed a liability it could not satisfy." *Id.* "Although the Respondents allegedly 'enabled thousands of investors to partake of the ETS scheme and caused ETS to incur millions of dollars in additional debt,' ETS 'devised the scheme,' transferred funds from IRA accounts, and 'with the sale of each phone, [] assumed a liability it could not satisfy.'" *Id.* at 26a-27a.

Based on the allegations in the Third Amended Complaint, Respondents moved to dismiss all Counts, and the District Court granted their motions on all Counts. Petitioner did not appeal the dismissal of Count II to the Eleventh Circuit. The Eleventh Circuit then affirmed the grant of dismissal as to the remaining Counts. Petitioner has not sought review of the Eleventh Circuit's affirmance of the dismissal of Count I (aiding and abetting breach of fiduciary duty to the Debtor), which was based on the Eleventh Circuit's finding that Georgia law does not recognize such a claim. Thus, this Petition is focused solely on the RICO claims brought by Petitioner against the Respondent IRA Custodians. In accordance with the Eleventh Circuit's Opinion and the decisions of the Second, Fourth, Sixth, Eighth and Tenth Circuits, these claims must fail and this Petition should be denied.

REASONS FOR DENYING THE PETITION

Petitioner is desperately trying to posture this as a case that requires intervention from this Court. However, the law is already clear and uniform that, under the facts alleged by the Petitioner, he is barred by the doctrine of *in pari delicto* from bringing the claims he alleged against the Respondents. The well reasoned opinions of the Eleventh Circuit and the District Court are grounded in sound legal principles and the specific "facts" taken from Petitioner's own Third Amended Complaint. Notwithstanding the harmony between these opinions and the opinions of every federal Court of Appeals that has addressed these issues, Petitioner begins his argument by claiming that this case presents the Court with the "opportunity" to issue the "definitive ruling" on an issue of "first impression"[1] and to "correct" the "consistently unjust and ill founded rulings issued by the Eleventh Circuit here, and all of the Circuits that have addressed the question to date." Because the legal points have been uniformly addressed by this Court and the Courts of Appeals, this Court should pass on this "opportunity" to rewrite the law and instead deny the Petition.

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1. In its Opinion, the Eleventh Circuit, in holding that *in pari delicto* can be asserted against a bankruptcy trustee, noted that "[a]lthough this is an issue of first impression in this Circuit, our sister circuits that have considered the issue have unanimously concluded that *in pari delicto* applies with equal force to a trustee-in-bankruptcy as a debtor outside bankruptcy." Petitioner's Appendix at 20a.

I. All of the Courts of Appeals That Have Addressed These Issues in Factually Similar Cases Have Uniformly and Unanimously Concluded That *In Pari Delicto* Applies to a Bankruptcy Trustee and That It Bars a Bankruptcy Trustee from Bringing the Types of Claims That Petitioner Is Trying to Bring against the Respondents.

Petitioner acknowledges throughout his Petition that all of the Courts of Appeals confronted with these issues have uniformly applied the defense of *in pari delicto* to bar a trustee's claims against third parties where the facts demonstrate that the debtor itself could not have brought the claims. In fact, six federal Courts of Appeals have now addressed this defense in the context of a bankruptcy trustee and unanimously applied the defense of *in pari delicto* to bar a bankruptcy trustee from bringing such claims. *See Official Comm. of Unsecured Creditors of Color Tile v. Coopers & Lybrand, LLP*, 322 F.3d 147, 158-166 (2d Cir. 2003); *see also Official Comm. of Unsecured Creditors v. R.F. Lafferty & Co., Inc.*, 267 F.3d 340, 356-357 (3d Cir. 2001); *Terlecky v. Hurd (In re Dublin Secs., Inc.)*, 133 F.3d 377, 381 (6th Cir. 1997); *Grassmueck v. Am. Shorthorn Ass'n*, 402 F.3d 833, 837 (8th Cir. 2005); *Sender v. Buchanan (In re Hedged-Inv. Assocs., Inc.)*, 84 F.3d 1281, 1285 (10th Cir. 1996); *Official Committee of Unsecured Creditors of PSA, Inc. v. Edwards (In re PSA, Inc.)*, 437 F.3d 1145, 1150 (11th Cir. 2006). While on the one hand acknowledging this uniformity in the law, Petitioner is on the other hand asking this Court to overturn all of these decisions in favor of an argument advocated by a small group of academics based on an inapplicable sentence taken from the legislative history of Section 541(d)[2] of the Bankruptcy

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2. As the Eleventh Circuit noted, "[t]he portion of the legislative history on which [Petitioner] relies pertains to section 541(d), not (Cont'd)

Code. The Northern District of Georgia and the Eleventh Circuit, in addressing the arguments raised by Petitioner, properly declined Petitioner's invitation to change the law. This Court should do the same and deny the Petition. Additionally and alternatively, this Petition should be denied because the Private Securities Litigation Reform Act specifically amended the Federal RICO Act to bar the claims that Petitioner has tried to bring in this case.

A. There Is No Split in Authority Regarding the Application of *In Pari Delicto* to a Bankruptcy Trustee.

Although Petitioner would like to find some authority contrary to the six Circuits that have already addressed this issue, the law is clear and uniform that the defense of *in pari delicto* can and should apply to a bankruptcy trustee when the complaint alleges that the debtor was an active participant in the alleged violation of law. The doctrine of *in pari delicto* is an equitable doctrine that states that "a plaintiff who has participated in wrongdoing may not recover damages resulting from the wrongdoing." Black's Law Dictionary 794 (7th ed. 1999).

In hopes of convincing this Court to rewrite the law, Petitioner argues several propositions, all of which lack legal support and are in fact contrary to the well-settled law in

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(Cont'd)

section 541(a). Section 541(d) governs '[p]roperty in which the debtor holds . . . only legal title and not an equitable interest, such as a mortgage secured by real property. . . .'" Petitioner's Appendix at 18a. "The portion of the legislative history quoted by [Petitioner] is inapplicable to the interpretation of 'property of the debtor estate' under section 541(a). *Id.*

this area. For instance, Petitioner has asked the Eleventh Circuit and this Court to find (a) that a trustee is not subject to the so-called "personal defenses" to which a debtor would otherwise be subject, and (b) that *in pari delicto* is one of these so-called "personal defenses." However, as the Eleventh Circuit noted, Petitioner has offered no law to support this position. ("Laddin provides no support for his assertion that *in pari delicto* is a personal defense that is excluded from the debtor estate under section 541(a)."). Petitioner's Appendix at 19a. Instead of legal support, Petitioner cites to a few academic articles and references one Southern District of Florida Bankruptcy Court opinion[3] that relied expressly on one of the academic articles. However, each of these commentators acknowledges that the law is contrary to his position and each advocates for a change in the law. This is not the proper forum to request a change in the law of bankruptcy.[4]

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3. In its Opinion below, the Eleventh Circuit expressly rejected the argument relied upon by the Judge in *Tolz v. Proskauer Rose LLP (In re Fuzion Tech. Group, Inc.)*, 332 B.R. 225 (Bankr. S.D. Fla. 2005). The court in *In re Fuzion* adopted the argument advocated by one of the commentators cited by Petitioner. *See* Petitioner's Appendix at 21a. Having now issued a definitive ruling, which is in accord with the decisions of all of the other Courts of Appeals that have addressed theses issues, the Eleventh Circuit has dealt with and rejected the arguments raised in the articles relied upon in this single, non-precedential, aberrant decision. Based on the Opinion below, the law in the Eleventh Circuit is clear that *in pari delicto* can bar a trustee from bringing claims under the facts alleged by Petitioner.

4. It is notable that when Congress overhauled the Bankruptcy Code in 2005, it did not take the opportunity to address the numerous uniform decisions of the Courts of Appeals that had applied *in pari delicto* to bar a trustee's claims.

B. There Is No Split in the Circuits Regarding the Interpretation of Section 541 of the Bankruptcy Code or Its Legislative History.

Petitioner desperately wants this Court to adopt a position advocated by a legal commentator who has argued that an inapplicable and almost universally ignored sentence from the legislative history of Section 541(d) of the Bankruptcy Code should be extrapolated and applied to interpret Section 541(a) so as to avoid the application of *in pari delicto* to bankruptcy trustees. This position is contrary to the opinions offered by, *inter alia*, all six of the Courts of Appeals that have addressed these issues. Contrary to Petitioner's unsupported argument, there is no split in authority regarding the interpretation of Section 541(a) of the Bankruptcy Code, which defines the debtor's estate.

Petitioner argued below that he should be able to bring claims that ETS could not have brought because, in his opinion, as trustee, he should not be subject to the same defenses, such as *in pari delicto*, to which ETS would have been subject if it brought the same claims outside of bankruptcy. However, Section 541(a) of the Bankruptcy Code provides that property of the debtor estate includes "all legal or equitable interests of the debtor in property *as of the commencement of the case*." (Emphasis added). In its Opinion below affirming the dismissal of Petitioner's claims, the Eleventh Circuit rejected Petitioner's argument and noted that it did not need to resort to the legislative history of Section 541(a) to understand Section 541(a) because the text of Section 541(a) is unambiguous, and that "the language of our laws is the law." *See* Petitioner's Appendix at 18a, *citing CBS Inc. v. Primetime 24 Joint Venture*, 245 F.3d 1217, 1227 (11th Cir. 2001).

The Eleventh Circuit continued that, "[u]nder the plain meaning of section 541(a), the debtor estate includes all legal or equitable interest *of the debtor* as of the commencement of the case. 11 U.S.C. § 541(a)." Petitioner's Appendix at 18a (emphasis in original).

> 'A bankruptcy trustee stands in the shoes of the debtor and has standing to bring any suit that the debtor could have instituted' when the debtor filed for bankruptcy, and there is no suggestion in the text of the Bankruptcy Code that the trustee acquires rights and interests *greater* than those of the debtor.

Id. "If a claim of ETS would have been subject to the defense of *in pari delicto* at the commencement of the bankruptcy, then the same claim, when asserted by the trustee, is subject to the same affirmative defense." *Id.*

Petitioner disagrees with the conclusion reached by the Eleventh Circuit (and all of the other Circuits that have addressed this issue). In hopes of inviting review by this Court, Petitioner mischaracterizes the Opinion of the Eleventh Circuit in order to try to create a controversy where there is none. Specifically, Petitioner claims that the Eleventh Circuit's Opinion somehow "conflicts" with some other courts that have reached the same conclusion as the Eleventh Circuit but have looked to the legislative history of Section 541 to do so. However, even if this illusory conflict did exist and the Eleventh Circuit were asked to look beyond the clear language of Section 541(a), the result would have been the same. Contrary to Petitioner's position, the Eleventh Circuit stated that "[e]ven if we considered legislative history, Laddin's argument would fail." Petitioner's Appendix at 18a.

The Court analyzed Petitioner's argument, which is drawn from the legal commentators who want courts to look to an inapplicable and properly ignored (in interpreting Section 541(a)) sentence of the legislative history of Section 541(d). In rejecting Petitioner's argument, the Eleventh Circuit expressly noted that "the legal commentators make the same flawed arguments about legislative history and the *Scholes*[5] decision that we have already rejected [earlier in our opinion]." *Id.* at 21a.

Petitioner is now inviting this Court to engage in the same wild goose chase in which the Eleventh Circuit refused to participate even though Petitioner had pointed out that the argument had been adopted by one solitary bankruptcy court in Florida[6] faced with easily distinguishable facts. The language of Section 541 is clear and the cases interpreting it are legion. There is no conflict in the authority and, in fact, no contrary authority adopting Petitioner's argument regarding the legislative history of Section 541.

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5. *Scholes v. Lehmann*, 56 F.3d 750 (7th Cir. 1995), was a case involving a receiver, not a bankruptcy trustee. Petitioner argues that the reasoning from *Scholes* should apply to a bankruptcy trustee despite the fact that receivers are not subject to the limitations of Section 541(a). It is noteworthy that the Seventh Circuit later narrowed *Scholes* to situations involving fraudulent transfers, which are not even at issue in this case with respect to the Respondents. *See Knauer v. Jonathon Roberts Fin. Group, Inc.*, 348 F.3d 230 (7th Cir. 2003).

6. Unlike the instant case, in *In re Fuzion*, there were multiple shareholders (Edwards was the sole shareholder of ETS) and innocent board members who actually terminated the bad actor when his conduct was discovered. Here, Petitioner's own allegations in this case demonstrate that ETS was an active participant in all stages of the alleged Ponzi scheme.

C. There Is No Split in the Federal Circuits on the Application of *In Pari Delicto* to Bar a Federal RICO Claim.

Petitioner claims that "numerous" federal courts have held that *in pari delicto* is not applicable to RICO claims in any case or context. Petitioner's Brief at 16. However, Petitioner cites to only two District Court cases for this sweeping proposition: *Harper v. American Tel. and Tel. Co.*, 54 F. Supp. 2d 1371, 1380 (S.D. Ga. 1999), and *In re National Mtg. Equity Corp. Mtg. Pool Certificates Sec. Litig.*, 636 F. Supp. 1138 (C.D. Cal. 1986). Both of these cases are factually and legally distinguishable. Unlike Petitioner's case, which is brought on behalf of a debtor, *Harper*[7] involved a lawsuit brought directly by individuals who alleged that AT&T had defrauded them, resulting in violations of the Federal RICO Act. There was no bankruptcy trustee involved and, more importantly, no allegations of the plaintiffs' involvement in the allegedly fraudulent scheme. *In re National Mortgage*, which was decided by the Central District of California in 1986, did not involve a bankruptcy trustee or allegations that demonstrated that the plaintiffs were active participants in the underlying securities violations.[8] Moreover, in *Williams*

7. In *Harper*, the court granted summary judgment to defendant AT&T based on the plaintiff's failure to satisfy the elements of a Federal RICO claim. In dicta, the court addressed the application of a state law defense based on the voluntary payment doctrine (O.C.G.A. 13-1-13) and briefly analogized it to the defense of *in pari delicto*.

8. The *In re National Mortgage* court specifically noted that the "*extent and nature of the Bank's participation in the alleged RICO violations may be relevant, assuming it turns out that*

(Cont'd)

v. California 1st Bank, 859 F.2d 664 (9th Cir. 1988), the Ninth Circuit reversed a California court's denial of a motion to dismiss a trustee's claims against a third party arising from the third party's alleged participation in a Ponzi scheme. Relying on this Court's decision in *Caplin v. Marine Midland Grace Trust Co.*, 406 U.S. 416 (1972), the Ninth Circuit held that the Trustee lacked authority to bring suit on the claims. *Williams*, 859 F.2d at 667 ("Indeed, since [the defendant] and [the debtor] may well stand *in pari delicto*, the bank likely will be able to subrogate itself to the investors' position to pursue their claims against the debtor's estate to recoup any judgments rendered in this action"). Thus, Petitioner has no support for his claims that there is a "split" in authority regarding the applicability of *in pari delicto* to a RICO case.

Petitioner argues half-heartedly that this Court's decisions in *Perma Life Mufflers, Inc. v. Int'l*, 392 U.S. 134,

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(Cont'd)

defendants are entitled to raise defense of 'complete involvement.'" 636 F. Supp at 1156 n.25 *citing THI-Hawaii, Inc. v. First Commerce Fin. Corp.*, 627 F.2d 991, 995 (9th Cir. 1980) (emphasis added). The court continued that, "Whether, if defendants can show that the Bank's conduct amounted to 'truly complete involvement and participation' in the alleged RICO violations, the Bank's treble damage claim should be barred, is an issue not presently before the Court." Here, Petitioner's own allegations demonstrate ETS's "complete involvement." As the Eleventh Circuit noted, the only mildly relevant statement from *In re National Mortgage* was a comment that the reasoning of this Court in *Perma Life Mufflers, Inc. v. International Parts Corp.*, 392 U.S. 134 (1968) regarding the punitive and deterrent aspects of antitrust treble damages is "equally applicable to RICO treble damage actions." Petitioner's Appendix at 28a. However, this does not speak to the issue of whether a trustee can assert such claims when the debtor itself was "completely involved" in the alleged conduct.

140 (1968), and *Bateman Eichler, Hill Richards, Inc. v. Berner*, 472 U.S. 299, 310-311 (1985), suggest that *in pari delicto* should not be applied in the Federal RICO context. First, these cases were not decided in the context of Federal RICO. Instead, they dealt with antitrust and securities issues, respectively. More importantly, both dealt with only passive participation in the underlying federal law violations. As the Eleventh Circuit noted in its Opinion, *Perma Life Mufflers*, which involved franchisees who were passively involved in alleged antitrust violations, "explicitly left open the question of whether complete involvement in an antitrust violation, 'wholly apart from the idea of *in pari delicto*,' would bar a plaintiff from bringing an antitrust claim." Petitioner's Appendix at 24a, *citing Perma Life Mufflers*, 392 U.S. at 140. *Bateman Eichler*, which involved tippees who were not active participants in the federal securities law violations, also noted that "where a plaintiff truly bore at least substantially equal responsibility for the violation, a defense based on such fault . . . *should be recognized.*" *Id.* at 308-309 (emphasis added). Thus, these opinions actually support Respondents' position that an active participant with complete involvement like ETS is barred from asserting these claims by *in pari delicto*. Because Petitioner can only bring the claims that ETS could have asserted, he is also barred. Thus, the opinions of this Court cited by Petitioner are actually in harmony, not conflict, with the opinions of the six Courts of Appeals that have already uniformly addressed these issues.

D. There Is No Support for Petitioner's Argument That Courts Should Ignore the Pre-Petition Conduct of the Debtor and Allow a Trustee to Bring Claims That the Debtor Could Not Have Brought.

In his Petition, Petitioner tries to shift the focus away from the actual pre-petition conduct of ETS alleged in his Third Amended Complaint. Rather, he wants to focus on his own post-petition appointment as trustee of the litigation trust. As "support" for his argument that a court should ignore the debtor's pre-petition participation in wrongful conduct, Petitioner erroneously cites this Court's decisions in *Segal v. Rochelle*, 382 U.S. 375 (1966), and *Kokoszka v. Belford*, 417 U.S. 642 (1974). Petitioner cites these cases as examples of cases where he claims that this Court looked at "bankruptcy policy and purposes" to determine what constitutes "property of the estate." Petitioner's Petition at 20. However, both of these cases are more properly read for the conclusion that, in order to determine whether a tax refund that was earned pre-petition but paid post-petition becomes property of the estate, the Court must look at pre-petition events to determine whether the amounts were "sufficiently rooted" in the pre-bankruptcy past and so little entangled with the debtor's ability to make an unencumbered fresh start that it should be regarded as "property." They do not address whether it is appropriate to ignore the pre-petition conduct that demonstrates that the debtor would have been barred from bringing the claims against the Respondents.

In *Segal*, this Court held that a business generated loss carry-back tax refund, which was based on pre-bankruptcy losses but was received after bankruptcy, should pass to the trustee under § 70(a)(5) property. *See Segal*, 382 U.S. at 380.

In *Kokoszka*, the Court affirmed an order directing the turnover of a debtor's income tax refund related to wages withheld before the debtor filed for bankruptcy. *See Kokoszka*, 417 U.S. at 648. Contrary to Petitioner's argument, these decisions highlighted the importance of focusing on what happened pre-petition in order to determine whether these specific assets came into the estate or not. These cases did not have anything to do with whether a trustee can assert a claim that the debtor could not have asserted because of the debtor's pre-petition involvement in the allegedly actionable conduct.

Petitioner's characterization of these cases ignores the forest for the trees and Petitioner fails to realize that these cases actually favor Respondents' position. Clearly, the focus in *Segal* and *Kokoszka* was on what the debtor did (or did not do) prior to the petition (*e.g.*, earning the wages and filing the taxes giving rise to the refund, etc.). Petitioner, on the other hand, wants the Court to ignore what ETS did pre-petition and allow him to bring a claim that, based on the pre-petition conduct of ETS, could not have been brought by ETS as of the commencement of its bankruptcy case. This position cannot be reconciled with the underlying policy behind, or clear language found in, the Bankruptcy Code, which fixes the petition date as the time when claims and defenses must be evaluated. As such, Petitioner's request for this Court to make a "definitive ruling" in this area, with no actual conflict or controversy in the law, should be rejected.

II. There Is an Additional and Alternative Basis for Affirming the Eleventh Circuit's Decision.

Although Petitioner has invited this Court to address a "split" in authority that does not exist, it is noteworthy that there is an additional and alternative basis for affirming the Eleventh Circuit's decision to affirm the dismissal of the RICO claims (Count XI, XII, and XIII) even if *in pari delicto* were not applicable. Section 107 of the Private Securities Litigation Reform Act ("PSLRA"), Pub. L. No. 104-67, 109 Stat. 737 (1995), amended the federal RICO Act to provide that "*no person may rely upon any conduct that would have been actionable as fraud in the purchase or sale of securities to establish a violation of section 1962.*" 18 U.S.C. § 1964(c) (emphasis added).

Numerous courts have relied upon this clear statutory language to bar RICO claims arising from conduct that could have been pursued as securities claims. *See, e.g., Bald Eagle Area School Dist. v. Keystone Financial, Inc.*, 189 F.3d 321, 327-29 (3d Cir. 1999) (affirming dismissal of RICO claims brought by investors in a Ponzi scheme against the custodians of the accounts in which the Ponzi scheme investments were held); *In re Enron Corp. Securities, Derivative & ERISA Litigation*, 284 F. Supp. 2d 511, 620 (S.D. Tex. 2003) (holding that "[t]he RICO Amendment bars claims based on conduct that could be actionable under the securities laws even when the plaintiff, himself, cannot bring a cause of action under the securities laws."); *Howard v. America Online, Inc.*, 208 F.3d 741, 749-50 (9th Cir. 2000), *cert. denied*, 531 U.S. 828 (2000) (affirming dismissal of RICO claims based on conduct actionable as securities fraud even though plaintiffs [AOL subscribers] lacked standing to bring

such securities fraud claims themselves); *Florida Evergreen Foliage v. E. I. DuPont De Nemours & Co.*, 165 F. Supp. 2d 1345, 1357 (S.D. Fla. 2001) (following *Howard*), *aff'd on other grounds sub nom*; *Green Leaf Nursery v. E. I. DuPont De Nemours & Co.*, 341 F.3d 1292 (11th Cir. 2003); *Fezzani v. Bear, Stearns & Co., Inc.*, 2005 WL 500377, *4-6 (S.D.N.Y. Mar. 2, 2005) (RICO claim barred even if particular defendant did not engage in actionable securities fraud).

In accordance with the plain language of Section 107 of the PSLRA, no one, not even the Petitioner, can rely upon conduct that would have been actionable as securities fraud to establish a RICO violation. This is precisely what the Petitioner is trying to do in this case. It is not disputed that numerous investors in ETS filed their own individual and putative class actions alleging securities fraud arising from their ETS investments.[9] In *SEC v. Edwards*, 540 U.S. 389 (2004), this Court even issued an opinion relating to the payphone investments at issue in this Petition and held that investment contracts promising a fixed rate of return (like the payphone investments offered by ETS) can be securities. In light of the fact that the investors/creditors of ETS could have (and have) asserted securities claims based on these same facts, Section 107 of the PSLRA provides an additional and alternative basis for affirming the dismissal of Petitioner's RICO claims.

9. The fact that the investors themselves have already asserted claims against, *inter alia*, the Respondents, for securities violations demonstrates that Petitioner's claim that he is representing those who cannot represent themselves is unfounded.

CONCLUSION

Petitioner has not established any compelling reason for this Court to grant the Petition. Therefore, Respondents respectfully request that the Petition be denied.

Respectfully submitted,

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